

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000504-001 DT

01/08/2014

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

J. Eaton

Deputy

MIDLAND FUNDING L L C

BARRY BURSEY

v.

STEVEN ROGERS (001)
CAROLINE ROGERS (001)

JOHN N SKIBA

REMAND DESK-LCA-CCC
UNIVERSITY LAKES JUSTICE COURT

HIGHER COURT RULING / REMAND

Lower Court Case No.CC2012–219276RC.

Defendants-Appellants Steven and Caroline Rogers (Defendants) appeal the University Lakes Justice Court's determination granting judgment to Plaintiff Midland Funding LLC (Plaintiff) after considering whether Plaintiff's documents were self-authenticating and had not violated the hearsay rule. Defendants contend the trial court erred by allowing Plaintiff to present the documents when (1) Plaintiff failed to provide them with written notice of its intent to offer the documents as self-authenticating documents and (2) the documents were not properly self-authenticated. For the reasons stated below, the Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On November 9, 2012, Plaintiff Midland Funding LLC filed a Complaint alleging Defendants entered into a credit card agreement with Chase Bank and defaulted on their obligation. Plaintiff claimed Defendants owed a principle charged off balance of \$4,081.28 plus interest for a balance of \$4,819.26 plus costs and attorneys' fees. Plaintiff alleged it was the "successor-in-interest" ("Holder") of the debt. Defendants filed a general denial. Plaintiff timely provided a Disclosure Statement. Defendants provided an untimely Disclosure Statement and alleged they planned to "use" any documents disclosed by Plaintiff. The trial court set trial for April 24, 2013.

Neither party testified or called witnesses at trial. Instead, Plaintiff's counsel brought various documents and asserted the documents were self-authenticating pursuant to Ariz. R. Evid. Rule 902(11). Defense counsel objected and claimed there was no evidence (1) indicating Plaintiff actually purchased any account linked to Defendants; or (2) tying Defendants to a debt to Plaintiff.¹

¹ Audio transcript, April 24, 2013, at 3:20:36–56.

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Plaintiff began by addressing Ariz. R. Evid. Rules 803(6) re the business rule exception and 902(11) re self-authenticating documents and argued Plaintiff supplied Defendants with its Disclosure Statement which included (1) Ms. Gohman's Affidavit; as well as (2) a copy of the bill of sale from Chase to Plaintiff; and (3) identifying information attached to the bill of sale.² Plaintiff's counsel asserted the Gohman Affidavit—Exhibit 1—stated (1) the account—J.P. Morgan Chase; (2) the account number ending in 3133; (3) the review for which the Affidavit was filed; and (4) gave the date of the last payment and the charge off amount.³ Plaintiff's counsel reviewed the bill of sale from Chase Bank as well as attached documents listing Defendants' account.⁴ Counsel then identified five pages of statements as well as a statement from Chase showing a due date and balance date.⁵ Plaintiff's counsel maintained (1) the documents were self-authenticating; and (2) written notice of Plaintiff's intent to use the documents was provided to Defendants when Plaintiff sent its Disclosure Statement.⁶

Defense counsel objected that (1) Plaintiff was trying to transfer the burden of proof to Defendants; and (2) the Disclosure Statement did not provide the written notice required by Ariz. R. Evid. Rule 902(11).⁷ Defense counsel argued the records could only be admitted according to Rule 902(11) if it was accompanied by an affidavit of the custodian or other qualified person; but the affidavit was created by Bonnie Gohman—an employee of Midland Credit Management (MCM)—who was not Plaintiff's employee.⁸ Defense counsel disputed Ms. Gohman's ability to attest to how Chase Bank or Plaintiff created, kept, and stored the records; and whether the records were created in the ordinary course of business.⁹ Defense counsel reviewed Ms. Gohman's affidavit and challenged Ms. Gohman's ability to discuss the records as Ms. Gohman stated her familiarity was with the business practices of MCM and not the practices of either Chase Bank or Plaintiff.¹⁰ Defense counsel asserted the documents lacked inherent reliability because they were unsupported by testimony of a custodian or other qualified person and were only portions of the records and not the entire record.¹¹ Defense counsel claimed Exhibit 2 re the bill of sale did not reference Defendants' name, address, or account number and emphasized nothing tied Defendants' account to the bill of sale provided by Chase Bank.¹² Defense counsel also posited the documents comprising Exhibit 3 were created by MCM from documents MCM claimed were provided by Chase Bank but were not part of the original sale document and were printed after the fact.¹³ Defense counsel maintained Ms. Gohman was not a qualified witness according to Ariz. R. Evid. Rules 902(11) and 806(3) for purposes of testifying about the alleged self-authenticating business documents.¹⁴

² *Id.* at 3:21:24–3:23:24.

³ *Id.* at 3:24:03–26.

⁴ *Id.* at 3:24:30–3:26:33.

⁵ *Id.* at 3:26:33–3:28:15.

⁶ *Id.* at 3:28:15–56.

⁷ *Id.* at 3:29:29–55.

⁸ *Id.* at 3:29:55–3:30:29.

⁹ *Id.* at 3:31:15–36.

¹⁰ *Id.* at 3:31:37–55.

¹¹ *Id.* at 3:31:56–3:32:13.

¹² *Id.* at 3:32:13–30.

¹³ *Id.* at 3:32:30–54.

¹⁴ *Id.* at 3:32:55–3:33:22.

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Plaintiff's counsel opposed this position and argued a qualified witness did not need to have participated in the creation or maintenance of the business records or know who recorded the information.¹⁵

The trial court admitted the documents over defense counsel's objection. Thereafter, each side provided the trial court with a post-trial memorandum on the issue of self-authentication of business records. Defendants asserted (1) Plaintiff failed to meet the requirements for Rule 902(11) because it failed to provide written notice it intended to offer the documents as self-authenticating; and (2) Ms. Gohman was not a qualified person or custodian of record because she was not employed by either Plaintiff or Chase Bank—Plaintiff's predecessor in interest—and did not claim familiarity with the record keeping practices of either entity. Defendants also claimed the documents did not qualify as a business records exception per Rule 803(6), Ariz. R. of Evid. Defendants attached a copy of Ms. Gohman's Affidavit. That Affidavit stated Ms. Gohman had access to pertinent account records for MCM and she had personal knowledge of the account records that were maintained on Plaintiff's behalf. She stated she was familiar with the manner and method by which (MCM)—not the Plaintiff—created and maintained its business records. She also stated MCM's records showed the Defendants owed a balance and her review of MCM's business records indicated Defendants opened an account with Chase Bank as well as the dates for the last payment posted to the account and the date the account was charged off.

The trial court granted judgment for Plaintiff. Defendants filed a timely appeal and challenged the trial court's evidentiary ruling accepting Ms. Gohman's testimony as supporting the proffered records as those of a regularly conducted business activity. Plaintiff Midland Funding LLC filed a responsive memorandum and asserted the records were admissible because (1) Defendants filed an untimely Disclosure Statement; and (2) Defendants asserted they "anticipated" using "any documents disclosed by Plaintiff" in their Disclosure Statement. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

- A. *Did The Trial Court Err By Admitting An Affidavit from Bonnie Gohman, An Employee of MCM Who Was Not Employed By Plaintiff—Midland Funding LLC.*

Standard of Review

The appellate court reviews a trial court's evidentiary rulings for a clear abuse of discretion and does not reverse unless unfair prejudice results. *Larsen v. Decker*, 196 Ariz. 239, 995 P.2d 281, ¶ 6 (Ct. App. 2000). Rulings on the admissibility of hearsay are reviewed for an abuse of discretion. *State v. Parker*, 231 Ariz. 391, 296 P.3d 54, ¶ 8 (Ariz. 2013).

We review a trial court's ruling on the admissibility of evidence under a hearsay exception for abuse of discretion. *State v. Tucker*, 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003).

Absent an abuse of discretion, the trial court's decision is not changed on appeal *Brown v. U.S. Fidelity and Guar. Co.*, 194 Ariz. 85, 977 P.2d 807, ¶ 7 (Ct. App. 1998).

¹⁵ *Id.* at 3:33:43–3:36:28.

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Abuse of Discretion

In addressing the role of the appellate court when determining discretionary conduct the Arizona Supreme Court held:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to “look over the shoulder” of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted).¹⁶

Where this Court reviews the trial court’s actions based on an abuse of discretion standard, this Court will not change or revise the trial court’s determination if there is a reasonable basis for the order. A court abuses its discretion when there is no evidence supporting the court’s conclusion or the court’s reasons are untenable, legally incorrect, or amount to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 141 P.3d 824 ¶ 17 (Ct. App. 2006). In determining if the trial court abused its discretion, this Court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

City of Phoenix v. Geyler, 144 Ariz. 323, 328–329, 697 P.2d 1073, 1078–1079 (1985) (citations omitted). Thus, a trial court abuses its discretion if it:

1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

McCarthy Western Constructors v. Phoenix Resort Corp., 169 Ariz. 520, 523, 821 P.2d 181, 184 (Ct. App. 1991) (citation omitted). Here, this Court finds the trial court used incorrect substantive law.

¹⁶ The Arizona Supreme Court noted in *State v. Benson*, 232 Ariz. 452, 307 P.3d 19 ¶ 66 (July 31, 2013) that a different standard for the abuse of discretion is used in death penalty cases as the legislature enacted A.R.S. 13–756 (A) after *Chapple* was decided. Although the case is “red flagged” by Westlaw, nothing in the case suggests it applies to civil matters.

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Who is qualified to testify about records under Ariz. R. Evid. Rule 902(11)

The question presented is if the trial court abused its discretion in admitting the affidavit of Ms. Gohman—a person who is not an employee of Midland Funding—to support the records as those of a regularly conducted activity so that no extrinsic evidence of authenticity is needed in order for the records to be admitted. Ariz. R. of Evid., Rule 902(11) provides:

Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C) as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

Ariz. R. of Evid., Rule 803(6) lists exceptions to the rule against hearsay and states records of regularly conducted activity may be admissible provided certain conditions are met. These are listed as:

6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

- (A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Ariz. R. Evid. 803(6). Defendants challenged the use of the records because they alleged (1) Ms. Gohman is not a proper custodian of records with first-hand knowledge acquired in the course of a regularly conducted business activity according to Ariz. R. Evid. Rule 803(6); and (2) Plaintiff failed to provide them with written notice of the intent to offer the record as a self-authenticating document.

Custodian of Records or Other Qualified Person

Ariz. R. Evid. Rules 803(6) requires a custodian or other qualified person to certify (1) the record was made near the time of the occurrence or from information provided by a person with knowledge of the matter; (2) the record was made as a regular practice; and (3) the record was kept in the course of regularly conducted activity. Persuasively, the Second Circuit Court of Appeals held it was not an abuse of discretion for a trial court to admit documents as business records pursuant to Fed. R. Evid. 803(6) even if the documents were the records of a business entity other than that of one of the parties if there were sufficient indicia of reliability. The

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Second Circuit determined the foundation for the documents could be laid by a witness who was not an employee of the entity that owned or prepared them provided the records were prepared in the course of the business entity's regular practice. *Saks Intern., Inc. v. M/V Export Champion*, 817 F.2d. 1011, 1013 (2nd Cir. 1987) Arizona's Rule 803(6) parallels the federal rule. Here, Ms. Gohman did not state the records about Defendants were prepared in the course of either Chase Banks's or Midland Funding's regular practice and did not attest to her having any personal knowledge about the regular business practices of either entity. These factors militate against any determination that Ms. Gohman was either a custodian of records or a qualified witness. In commenting on Rule 803(6) the Arizona Court of Appeals said:

Rule 803(6) requires either the custodian of records or "other qualified witness" testify that the record was made 1) contemporaneously, or nearly so, with the underlying event; 2) "by, or from information transmitted by, a person with firsthand knowledge acquired in the course of a regularly conducted business activity;" 3) completely in the course of that activity; and 4) as a regular practice for that activity. Portions of the business record that "indicate a lack of trustworthiness" or "lack an appropriate foundation" shall not be admitted. Ariz. R. Evid. 803(6), Stewart testified he was "a supervisor of the security services section" of the Pima County jail, had supervised intake of new inmates at the jail for "maybe a year" during the "eight or nine years" he had been a sergeant, and had actually worked as an "ID tech" for two to three years. He also testified the process for booking inmates was the same, although occurring in a different location, as when he had been supervising intake. He described the process in some detail, including the fact that inmate information was recorded by a jail employee as it was received from the inmate being booked. Finally, Stewart testified he was familiar with arrangements for storing inmate property receipts at the jail, although he had not supervised that process, and such receipts were routinely created as part of the normal course of business at the jail.

Based on this record, we cannot say the trial court abused its discretion in finding Stewart a qualified witness with respect to the jail records. *See Larsen*, 196 Ariz. 239, ¶ 19, 995 P.2d at 285; *Petzoldt*, 172 Ariz. at 275, 836 P.2d at 985. Accordingly, we conclude the trial court did not abuse its discretion in admitting the receipt and statements that he read from the jail admission form under Rule 803(6). *See Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d at 118; *King*, 213 Ariz. 632, ¶ 7, 146 P.3d at 1277.

State v. McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶¶ 9–10 (Ct. App. 2007). Although Ms. Gohman is a legal specialist with MCM and MCM is the company that "services" Plaintiff's account, Ms. Gohman is not the custodian of records for Plaintiff. She did not state she had any familiarity with Plaintiff's business practices, or detail her time or experience in working with Plaintiff. She failed to explain how—or if—she had any knowledge about the business practices of either Chase Bank or Plaintiff. Persuasively, the Third Circuit Court of Appeals established the standard for determining a qualified witness. The Third Circuit ruled:

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Rule 803(6) does not require the foundation evidence for the admission of a business record to be provided by the record's custodian. Instead, the rule authorizes parties to elicit the evidence from any "other qualified witness." Fed. R. Evid. 803(6). We have recognized that the term "other qualified witness" should be construed broadly, and that a qualified witness " 'need not be an employee of the [record-keeping] entity so long as he understands the system.' " *Pellulo*, 964 F.2d at 201 (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 803(6)[02], at 803–178). Thus, a qualified witness only need "have familiarity with the record-keeping system" and the ability to attest to the foundational requirements of Rule 803(6). *Id.* at 201–02. The foundation requirements to which a qualified witness must attest are:

- (1) [that] the declarant in the records had knowledge to make accurate statements;
- (2) that the declarant recorded statements contemporaneously with the actions which were the subject of the reports; (3) that the declarant made the record in the regular course of the business activity; and (4) that such records were regularly kept by the business.

United States v. Console, 13 F.3d 641, 656-57 (3d Cir. 1993). Although Plaintiff asserted its viewpoint was endorsed by *U.S. v. Adefehiniti*, 510 F.3d 319 (D.C. Cir. 2007) and relied on by the Arizona Supreme Court in *State v. Parker*, *id.*, there is a salient difference because (1) Ms. Gohman is not Plaintiff's employee; and (2) Plaintiff did not establish it relied on the Chase records through Ms. Gohman's affidavit. A review of her affidavit demonstrates the gaps it left: (1) Ms. Gohman did not state Chase Bank's records were incorporated into Plaintiff's records and relied on in Plaintiff's day to day operations; (2) she did not state she was familiar with the day to day operations of Plaintiff's business; (3) she did not attest she was familiar with the procedures Chase Bank used to create the records; and, (4) instead, she limited her affidavit to her familiarity with the business practices of a third entity—MCM—and asserted she reviewed MCM's business records and MCM's records showed Defendants owed a balance. Ms. Gohman also failed to indicate (1) any relationship between MCM and Chase Bank; or (2) the extent of MCM's relationship with Plaintiff other than to state MCM is a "servicer" for the account. Her affidavit did not state MCM regularly relied on the business records of either Chase or Plaintiff.

Prior to accepting Plaintiff's proffered records as self-authenticating, the trial court needed to determine if Ms. Gohman was a qualified person to discuss Plaintiff's records. As stated, Ms. Gohman's affidavit did not indicate she had any direct connection with Chase Bank or any knowledge of Chase Bank's business practices. Therefore, she could not accurately comment about these practices. She did not aver—nor indicate any basis for knowing—if the Chase Bank records were created at or near the time of the event as required by Ariz. R. Evid., 803(6)(a). She also failed to explain the source of any knowledge as to how or when the records were created. There is little to establish how Ms. Gohman was a qualified witness.

Although the term "qualified witness" may be broadly interpreted, the witness must have familiarity with the record keeping system. Here, there was insufficient evidence to show Ms. Gohman was familiar with (1) the record keeping practices of either Chase Bank or Plaintiff; (2) how the records were transferred from Chase Bank to Plaintiff; and (3) how records were transferred from Plaintiff to MCM. The Second Circuit stated:

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The term, custodian or other qualified witness, in Rules 803(6) and 902(11) is generally given to a very broad interpretation. The witness need only have enough familiarity with the record-keeping system of the business in question to explain how the record came into existence in the ordinary course of business.

U.S. v. Lauersen, 348 F.3d 329, 342 (2nd Cir. 2003). The U.S. District Court for the Eastern District of Virginia reviewed the standards of personal knowledge for an affiant and stated:

Under the plain text of Rules 803(6) and 902(11), all requirements for admissibility must be met if a document is to be admitted into evidence. Rule 902(11) states that a custodian or other qualified witness must certify in the written declaration that the proffered document meets three requirements which are listed without ambiguity. The fourth element is that which requires the affidavit of a custodian or other qualified witness. The necessity to satisfy all four requirements also finds expression in the decisional law. *See, e.g., United States v. Strother*, 49 F.3d 869, 874 (2nd Cir.1995) (holding that, while “the ‘principal precondition’ to admissibility is the sufficient trustworthiness of the record, the proffered record must meet all of the requirements of the exception”); *United States v. Atlas Lederer Co.*, 282 F. Supp.2d 687, 696 (S.D. Ohio 2001) (citing *Redken Labs., Inc. v. Levin*, 843 F.2d 226, 229 (6th Cir.1988)) (holding that for a business record to be admissible under Rule 803(6) “the record must satisfy four requirements”).

Rambus, Inc. v. Infineon Technologies AG, 348 F. Supp. 2d 698, 706 (E.D. Va. 2004). Ms. Gohman’s Affidavit did not meet this standard. It may well be that Ms. Gohman actually had the requisite knowledge. However, because (1) she did not indicate how the record “came into existence in the ordinary course of business” and (2) failed to testify, Defendants were deprived of the opportunity to test her knowledge about the record keeping practices of either Plaintiff or its predecessor in interest.

Although Plaintiff relied on *Adefehinti*, as its authority for allowing business record testimony where the bank employee witness had no direct personal knowledge of the circumstances surrounding the creation of the documents, *Adefehinti* differed from the current case. In *Adefehinti*, the D.C. Cir. addressed a situation where the records from the original company were integrated into a second company’s records and relied on in the day to day operations of the second company. In Defendants’ case, the original—Chase Bank—company’s records became incorporated in the records of a third company—MCM—but no one testified the records were incorporated into Plaintiff’s records or relied on by Plaintiff in Plaintiff’s day to day operations. There was no substantiating information about how the records were created, who created the records, how the records were transferred to Plaintiff or how the third company—MCM—came to have these records. Indeed, the only connection the records about Defendants had to the current litigation was the unsupported affidavit from Ms. Gohman,—a person not employed by Plaintiff—stating she was familiar with the manner and method by which MCM created and maintained its records. As stated, her affidavit did not indicate (1) Ms. Gohman had any familiarity with the manner in which either Chase Bank or Plaintiff created and maintained records; (2) how MCM obtained the records; or (3) if the MCM records about Defendant had any inherent reliability. The Bill of Sale did not specifically list Defendants or Defendants’ account; and only

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indicated it transferred and assigned “certain receivables, judgments or evidences of debt described in the Final Data File.” No one indicated Defendants’ account was included in the Final Data File as the Affidavit of Sale of Account by Marin Lavergne lists a “pool of charged-off accounts” but does not specify Defendants’ accounts were included in that “pool.”

While—as Plaintiff indicated—a foundation witness may not need to personally participate in the creation of a document *U.S. v. Keplinger*, 776 F.2d 678, 693 (7th Cir. 1985), a foundation witness must still demonstrate it has some knowledge connecting it with the record’s creation and transfer that shows the record is inherently reliable. Ms. Gohman’s affidavit lacked that support. Her affidavit did not confirm Plaintiff regularly relied on information from third parties in the ordinary course of Plaintiff’s business or that Plaintiff relied on the information MCM obtained. The Arizona Supreme Court allowed testimony from a third party about business records when the witness received the original invoices. The Court stated:

As foundation for offering the documents, appellee’s witness Karl Dennison testified that when materials were shipped to him, he received original invoices thereof and that the documents in question were duplicate copies of the invoices of materials which he received from Westinghouse.

Colvin v. Westinghouse Elec. Corp., 79 Ariz. 275, 277, 288 P.2d 490, 492 (1955).¹⁷ However, unlike *Colvin*, Ms. Gohman did not testify she personally ever received any original or duplicate documents.

Most recently, the Arizona Supreme Court discussed the exceptions to the hearsay rule for business records in *State v. Parker, id.*, where the bank’s fraud investigator testified about the bank’s business practices. The Arizona Supreme Court referenced *Adefehinti*, and discussed cases that allowed the business records of one entity to be used as the business record of another if the second entity relies on those record and keeps them in the ordinary course of business. However, in order to incorporate these records, a witness must testify:

. . . “that the records are integrated into a company’s records and relied upon in its day-to-day operations,” and noting that relevant financial statements were completed at bank’s request and were of a type that the bank regularly used to make decisions whether to extend credit.

Adefehinti at 510 F.3d at 326. Ms. Gohman’s affidavit did not meet this standard and did not establish the needed degree of reliability to allow the records to be considered self-authenticating.

This Court is cognizant of its need to review a trial court’s decision to admit or exclude evidence deferentially. *State v. Petzoldt*, 172 Ariz. 272, 276, 836 P.2d 982, 986 (Ct. App. 1991). Nonetheless, this Court finds the trial court abused its discretion when it allowed an affiant who had no direct role in the credit card sales transaction to attest to the reliability of records about the debt exchanged between the original creditor and its successor in interest when the affiant (1) worked for an unrelated company; and (2) averred no direct knowledge of the business practices of either the original company or its successor in interest.

¹⁷ Although *Colvin v. Westinghouse Elec. Corp, id.*, dealt with the Uniform Business Records as Evidence Act, the statute was a predecessor to Rule 803(6).

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B. Did The Trial Court Err By Admitting Plaintiff's Proffered Documents After Defendants Wrote—In Their Disclosure Statement—They Would Use Any Documents Plaintiff Offered.

Notice of Intent to Use Self-Authenticating Records at Trial

Defendants also challenged Plaintiff's notification of its intent to rely on self-authenticating documents at trial. Defendants relied on the language of Ariz. R. of Evid. Rule 902(11) re "Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record" and maintained Plaintiff did not specifically state it was offering its business records as self-authenticating documents. The Ninth Circuit addressed a similar issue and held documents contained in a "penitentiary packet," including evidence of defendant's prior convictions, his fingerprints, and his photograph, were not properly authenticated under Rule 902(11) because (1) the government never provided written notice of its intention to offer the records as self-authenticating under that provision; and (2) the defendant had little opportunity to verify the authenticity of either the records or any foundational testimony or affidavits. *U.S. v. Weiland*, 420 F.3d 1062, 1072–1073 n.7 (9th Cir. 2005). The Ninth Circuit determined Rule 902(11) did not contain an exception to the notice requirement for cause shown—good or otherwise. Similarly, the Fifth Circuit also mandated timely notice before records were found to be self-authenticating pursuant to Rule 902(11) and maintained:

Nor did the district court abuse its discretion in refusing to give effect to the untimely offered affidavit. The notice requirements of Rule 902(11) are in place precisely to ensure that evidence to be accompanied by an affidavit can be vetted for objection or impeachment in advance. In this case, while the exhibits in question were available in advance, the way in which the evidence was to be introduced forms part of the necessary notice and understandably gave the government pause at trial.

U.S. v. Brown, 553 F.3d 768, 793 (5th Cir. 2008). Although Plaintiff provided the documents and listed them as evidence in its Disclosure Statement, Ariz. R. Evid. 902(11) requires written notice that a party plans to use the documents as self-authenticating documents and not just written notice that a party plans to use the document. Plaintiff did not indicate it identified the documents as self-authenticating in its Disclosure Statement. Therefore, Plaintiff did not abide by the strictures of the rule mandating written disclosure.

Plaintiff offered a non-responsive rejoinder to Defendants' evidentiary challenge by arguing Defendants should have been precluded from challenging Plaintiff's documents because Defendants wrote—in their Disclosure Statement—they anticipated using Plaintiff's documents in their defense. Notably, Defendants did not state they accepted the documents as either true or self-authenticating. Instead, they asserted they might "use" the documents. Defendants did not stipulate to the admissibility of the documents as self-authenticating documents. Challenging the veracity of the documents is a potential use for the document.

Defendants were not obliged to provide these documents to Plaintiff. Instead, that obligation is imposed on Plaintiff. As stated in JCRCP Rule 121(a)(3)(B):

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In a contested case based upon the collection of a consumer debt (a debt entered into for personal, family, or household purposes), the plaintiff must disclose all available evidence related to the allegations contained in the complaint. These include:

- (i) The agreement between the creditor and consumer, if available, upon which the complaint is based;
- (ii) Any available billing statement to the consumer;
- (iii) If the debt has been assigned, evidence that the plaintiff is the owner of the debt;
- (iv) Information concerning the date of the last payment made by the consumer, if available;

Rule 121(c) provides a party's disclosure must include enough information so that (1) a witness who is called; or (2) an exhibit that is presented; will not surprise the other party at trial. Plaintiff, in its responsive memorandum, emphasized Defendants' alleged timely failure to disclose but did not indicate it (1) sought compliance; or (2) an order compelling disclosure; or (3) sanctions for this alleged failure; pursuant to Rule 127 JCRCP. Indeed, although Plaintiff asserted on appeal that it was incumbent on Defendants to admit or deny if they (1) applied for a credit card with Chase Bank; (2) used a credit card from Chase Bank; (3) received monthly statements from Chase Bank; (4) made any payments on a credit card to Chase Bank; (5) defaulted on a credit card with Chase Bank; or (6) acknowledged a credit card debt with Chase Bank;¹⁸ these admissions were subject to a JCRCP Rule 126 Request for Admissions and not a duty imposed as part of a disclosure statement.¹⁹ Plaintiff's position is not well taken on appeal as Plaintiff did not demonstrate it asked the trial court to rule on any alleged discovery abuse and Plaintiff did not file a cross-motion for appeal.

III. CONCLUSION.

Based on the foregoing, this Court concludes the University Lakes Justice Court erred.

IT IS THEREFORE ORDERED reversing the judgment of the University Lakes Justice Court.

IT IS FURTHER ORDERED remanding this matter to the University Lakes Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS

Judicial Officer of the Superior Court

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NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

¹⁸ Appellee's Response Memorandum at p. 6, ll. 22–27; p. 7, ll. 1–8.

¹⁹ *Id.* at p. 7, l. 10 where Plaintiff wrote "Defendants had a duty to specifically admit or deny of the above facts."